

REMARKS

In the Decision on Appeal decided on September 11, 2009, the Board of Patent Appeals and Interferences reversed the Examiner's rejection of claims 1-18 under 35 U.S.C. § 102(b), but affirmed the Examiner's provisional rejection of claims 1-18 under the judicially-created doctrine of obviousness-type double patenting as being unpatentable over claims 1-20 of co-pending application number 10/449,975. Therefore, the provisional obviousness-type double patenting rejection is the only remaining rejection in the present application. Claims 19-31 were previously canceled. As such, claims 1-18 remain pending in the present application.

Claim Rejections under Doctrine of Obviousness-Type Double Patenting

As set forth in Section 804(I)(B) of the Manual of Patent Examining Procedure, the procedure employed in an obviousness-type double patenting is as follows:

B. Between Copending Applications—Provisional Rejections

Occasionally, the examiner becomes aware of two copending applications that were filed by the same inventive entity, or by different inventive entities having a common inventor, and/or by a common assignee, or that claim an invention resulting from activities undertaken within the scope of a joint research agreement as defined in 35 U.S.C. 103(c)(2) and (3), that would raise an issue of double patenting if one of the applications became a patent. Where this issue can be addressed without violating the confidential status of applications (35 U.S.C. 122), the courts have sanctioned the practice of making applicant aware of the potential double patenting problem if one of the applications became a patent by permitting the examiner to make a "provisional" rejection on the ground of double patenting. *In re Mott*, 539 F.2d 1291, 190 USPQ 536 (CCPA 1976); *In re Wetterau*, 356 F.2d 556, 148 USPQ 499 (CCPA 1966). The merits of such a provisional rejection can be addressed by both the applicant and the examiner without waiting for the first patent to issue.

The "provisional" double patenting rejection should continue to be made by the examiner in each application as long as there are conflicting claims in more than one application unless that "provisional" double

patenting rejection is the only rejection remaining in at least one of the applications.

M.P.E.P. § 804(I)(B) (emphasis added).

As described above, the Examiner provisionally rejected claims 1-18 under the judicially-created doctrine of obviousness-type double patenting as being unpatentable over claims 1-20 of application number 10/449,975. However, as noted above, a provisional double patenting rejection should not be maintained if it is the only rejection remaining in at least one of the applications. As described above, the provisional obviousness-type double patenting rejection is the only rejection remaining in the present application and, thus, should no longer be maintained. In addition, Applicants note that application number 10/449,975 is no longer co-pending, but has been abandoned. As such, the double patenting rejection is moot. Therefore, Applicants respectfully request that the Examiner withdraw the provisional obviousness-type double patenting rejection and allow all pending claims 1-18.

Conclusion

In view of the remarks and amendments set forth above, Applicants respectfully request allowance of the pending claims. If the Examiner believes that a telephonic interview will help speed this application toward issuance, the Examiner is invited to contact the undersigned at the telephone number listed below.

Respectfully submitted,

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